(6)

FILED
NOV 1 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-465

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR BUSINESS AND PROFESSIONAL PEOPLE FOR THE PUBLIC INTEREST AND CITIZEN ACTION/ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MYRON M. CHERRY
30 N. LASALLE STREET
SUITE 2300
CHICAGO, IL 60602
(312) 372-2100

JEROME J. SHESTACK
Counsel of Record
1650 ARCH STREET
PHILADELPHIA, PA 19103
(215) 977-2290

November 1, 2006

Counsel for Amici Curiae

QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

TABLE OF CONTENTS

Page

Question Presented i

Table Of Authorities iii

Interests Of The *Amici Curiae* 1

Statement Of The Case 2

Argument 6

I. This case involves an issue of great public importance deserving of this Court's review not only because of the substance of the holding below, but also because of the questionable way in which it was decided by a state supreme court 6

II. The four justices' resolution of the proper interpretation of Federal Trade Commission consent orders "entirely" on state law grounds was an attempt to shield their decision by review in this Court, another factor which supports a grant of certiorari 8

Conclusion 11

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v Lavoie, 475 U.S. 813 (1986).....6,7

Avery v. State Farm Mut. Auto Ins. Co., 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 126 S.Ct. 1470 (2006).....12

Cox v. Louisiana, 379 U.S. 559 (1965).....6

Enterprise Irrig. Dist. v. Canal Co., 243 U. S. 157 (1917).....8

In re Murchison, 349 U.S. 133 (1955).....7

Johnson v. Risk, 137 U.S. 300 (1890).....9

Leathe v. Thomas, 207 U. S. 93 (1907).....8,9

Louisiana Pub. Service Comm'n v. FCC, 476 U.S. 355 (1986).....10

McConnell v. FEC, 540 U.S. 93 (2003).....6

McCoy v. Shaw, 277 U.S. 302 (1928).....8

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000).....6

Republican Party of Minn. v. White, 536 U.S. 765 (2002).....6

Ward v. Love County, 253 U. S. 17 (1920).....8

STATUTES

ILLINOIS ELECTION CODE, 10 ILCS § 5/9-1, *et seq.*.....3

CONSTITUTIONAL PROVISIONS

ILL. CONST. ART. VI, § 3.....4

ADMINISTRATIVE MATERIALS

Federal Trade Commission Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158 (1997) 9-10

OTHER MATERIALS

Barbara Rose, *Philip Morris Law Firms, Supporters Backed Judge*, CHICAGO TRIBUNE, December 16, 2005 7

Brief of the National Association of Manufacturers and the Illinois Manufacturers' Association as Amici Curiae in Support of Appellant Philip Morris USA Inc., 2003 WL 25291621 7

Buying Justice, ST. LOUIS POST-DISPATCH, Nov. 5, 2004 5

Buying Justice, ST. LOUIS POST-DISPATCH, Dec. 20, 2005 ..... 7, 8

Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2002*, (Justice at Stake 2004) (available at http://faircourts.org/files/NewPoliticsReport2002.pdf) 11

Deborah Goldberg *et al.*, *The New Politics of Judicial Elections 2004*, (Justice At Stake 2005) (available at http://www.JusticeatStake.org/files/NewPoliticsReport2004.pdf) 11

Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake State Judges Frequency Questionnaire (2002) (available at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf) 11

Justice at Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004) (available at http://faircourts.org/files/ZogbyPollFactSheet.pdf) 11

Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Assoc. Press (AP Wire), Nov. 3, 2004 11

State of Illinois Judicial Inquiry Board, Request for Investigation of Justice Lloyd Karmeier (available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1413079) 3,4

INTERESTS OF THE *AMICI CURIAE* [1]

Amicus curiae Business and Professional People for the Public Interest (BPI) is a public interest law and policy center founded in 1969 by Gordon B. Sherman, then-president of the Midas Muffler Corporation. BPI seeks out and addresses compelling issues of social justice and quality of life in the Chicago region. BPI's staff of lawyers and policy analysts use legal and policy research, advocacy, organizing, litigation, and collaboration with non-profit, business, community and governmental organizations to accomplish its mission. BPI works to transform segregated public housing, revitalize economically disadvantaged communities, improve Chicago's public schools, and increase the supply of affordable housing throughout the region.

Amicus curiae Citizen Action/Illinois is the largest public interest organization in Illinois and is a political coalition committed to creating social change both in Illinois and across the nation. Founded in 1997, Citizen Action works on behalf of the public interest both in the Illinois state capital and Washington, D.C. and is built on a tradition of strong grassroots citizen organizations. Citizen Action's organizational affiliates include statewide organizations and local groups, represented on a 97-member Policy Council which also includes leaders serving as individuals, among them members of Congress, state legislators, and local government officials. The organization is based on several core values: a belief that every human life has equal worth, that the purpose of our society is to allow all its members to live meaningful and fulfilling lives, and that there is a collective good beyond our individual interests. Citizen Action seeks to promote and win public policies that reflect these values and embody social justice.

---

[1] No counsel for a party authored any part of this brief. No person or other entity other than *amici curiae* contributed monetarily to the preparation and submission of this brief. Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Amici support the petition for a writ of certiorari in this case first because it presents an important question concerning the effect of widely-used Federal Trade Commission consent decrees. Of equal concern, however, is the way in which the Illinois Supreme Court decided this case: allowing the deciding vote in a case impacting millions of Illinois citizens to be cast by a judge seated on the state's highest court ***after*** the case was submitted for final decision and ***after*** that judge had just received generous election campaign donations from the very party in whose favor he cast that deciding vote. Thus the way in which this case was decided—a case which undeniably and significantly effects so many—is an additional factor which weighs heavily in favor of this Court granting the petition for a writ of certiorari.

STATEMENT OF THE CASE

After initially refusing to accept a direct appeal in this case from the trial court, the Illinois Supreme Court later ordered a direct appeal *sua sponte* in September 2003, taking the case from further consideration by the intermediate appellate court and bypassing the normal appellate process. Between that time and December 15, 2005 (when the Court issued its decision), a seat on the supreme court was vacated as a result of the retirement of one of the justices. That seat was filled during the pendency of the case through a partisan election in November 2004 which was the costliest judicial race in American history.

One of the candidates for the open seat was Judge Gordon Maag, who had presided over appellate court proceedings regarding the amount of the appeal bond before the supreme court took the direct appeal. Judge Maag therefore would not have been able to participate further in the case as a supreme court justice had he been elected. The other candidate was then-Washington County circuit court Judge Lloyd Karmeier. Justice Karmeier won the election on November 4, 2004, and took office on December 1.

During the campaign, Justice Karmeier raised and spent more than $4.8 million.[2] He received millions of dollars in campaign donations collectively from Philip Morris's *amici* supporters, Philip Morris's trial counsel, Altria Corporation (Philip Morris's parent corporation), and even from Philip Morris itself. Altria Corporation (both in its own name and on behalf of Philip Morris), Philip Morris's trial counsel, and *amici* counsel contributed $22,000 to the Illinois Manufacturers Association (one of Philip Morris's *amicus* supporters in the case) through contributions to the Manufacturers' PAC. State of Illinois Judicial Inquiry Board, Request for Investigation of Justice Lloyd Karmeier at 12 (available at http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1413079). These donations were, in turn, contributed directly to the Karmeier campaign. *Id.* Altria's subsidiary, Kraft Foods, is a member of the Illinois Civil Justice League (ICJL) which filed an *amicus* brief in support of Philip Morris (later rejected on procedural grounds). *Id.* The ICJL's political action committee, JUSTPAC, contributed $1,191,452.72 to the Karmeier campaign. *Id.*

Justice Karmeier's campaign also accepted donations from Philip Morris's trial counsel in this case, from the law firms representing Philip Morris at trial and on appeal, and from law firms and lawyers representing Philip Morris's *amici* supporters. *Id.* Justice Karmeier accepted over $1.6 million from the United States Chamber of Commerce paid through contributions to the Illinois Republican Party, which in turn forwarded the monies to the Karmeier campaign. *Id.* The Chamber later filed an *amicus* brief in support of Philip Morris in the supreme court. Justice Karmeier's campaign also received

---

[2] Illinois places no limits on the amounts or sources of campaign contributions that a candidate, judicial or otherwise, may accept. Individuals, corporations, and groups, including political action committees, may all donate to judicial campaigns. The Illinois Election Code, 10 ILCS § 5/9-1, *et seq.*, imposes disclosure requirements on candidates and groups which accept contributions or make expenditures.

$284,338.32 directly from affiliates of the United States Chamber of Commerce, the Illinois Chamber of Commerce (another Philip Morris *amicus* supporter), Illinois Chamber PAC, and Chicagoland Chamber of Commerce PAC. *Id.*

On November 10, 2004, prior to Justice Karmeier taking office, the supreme court heard oral arguments. As a result of the vacant seat and another justice's recusal (Pet. App. at 88a), only five justices heard argument in the case. If only those five justices had decided the case, the trial court's judgment would have been affirmed because only three of them ultimately voted to reverse the judgment; the Illinois constitution requires the concurrence of four justices to overturn a lower court decision, even when fewer than all seven justices hear a case. ILL. CONST. ART. VI, § 3. However, more than a year after oral argument, the supreme court issued its decision reversing the trial court's judgment by a one-justice margin. Despite having received millions of dollars in campaign donations collectively from Philip Morris's *amici* supporters, Philip Morris's trial counsel, Altria and even from Philip Morris itself, Justice Karmeier participated in the decision of the case and provided the pivotal vote to reverse the trial court's judgment against Philip Morris.

The majority pointedly noted that their decision should in no way be interpreted as an exoneration of Philip Morris. Pet. App. at 81a ("Our resolution of the present case is in no way an expression of our approval of PMUSA's alleged conduct."). *See also id.* at 98a (Karmeier, J., concurring) ("I hasten to add, as the majority opinion did, that rejection of plaintiffs' cause of action should in no way be construed as an endorsement of PMUSA's conduct. Our reversal of the circuit court's judgment is not an exoneration of PMUSA."). Justice Karmeier even agreed that the record supported a finding that Philip Morris had committed fraud. *See id.* at 89a-90a ("The record in the case before us shows that PMUSA developed and marketed Marlboro Lights and Cambridge Lights cigarettes in re-

sponse to heightened public concern over health risks posed by smoking. ... In reality, and as PMUSA was fully aware, the so-called 'light' cigarettes not only offered no health benefits, but were actually more toxic."). The majority nevertheless reversed on the rationale that the FTC had specifically "authorized" Philip Morris's use of the "lights" and "lowered tar" terms.

In an apparent attempt to insulate their conclusion from this Court's review, after discussing the issue of federal preemption at some length, the four justices avoided drawing the obvious legal conclusion from their ruling: the FTC's "authorization" of Philip Morris's conduct would preempt Petitioners' state law claims. The justices instead concluded that such FTC "authorization" defeated Petitioners' claims as a matter of state law. Justice Karmeier authored a special concurrence explaining that he would reverse the trial court on the additional ground that the defrauded plaintiffs had not proven they had suffered any actual damages, proving prophetic the *St. Louis Post Dispatch*'s observation that "[b]ig business won a nice return on a $4.3 million investment in Tuesday's election. It now has a friendly justice on the Supreme Court of Illinois. ... [A]nyone who believes in evenhanded justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat." *Buying Justice*, ST. LOUIS POST-DISPATCH, Nov. 5, 2004 at B6.

ARGUMENT

I. THIS CASE INVOLVES AN ISSUE OF GREAT PUBLIC IMPORTANCE DESERVING OF THIS COURT'S REVIEW NOT ONLY BECAUSE OF THE SUBSTANCE OF THE HOLDING BELOW, BUT ALSO BECAUSE OF THE QUESTIONABLE WAY IN WHICH IT WAS DECIDED BY A STATE SUPREME COURT.

As this Court has recognized, maintaining the integrity of the judiciary and respect for its judgments is a vital interest "of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). Courts have a compelling interest in protecting against the possibility of public perception that judicial action "did not flow only from the fair and orderly working of the judicial process." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965). In the context of elective offices, such as seats on the Illinois Supreme Court, there is also a compelling interest in preventing "the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell v. FEC*, 540 U.S. 93, 136 (2003).

That vital interest of preventing the appearance of corruption is "not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000). Preventing such appearances is all the more imperative in the context of judicial elections in light of the fact that in the judicial realm, only two litigants are before a judge, and only one of them will win; the other will necessarily lose.

For these reasons, this Court has previously held that the Due Process Clause requires the recusal of a state supreme court justice where his participation as the decisive vote creates the appearance of potential bias. *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813 (1986). In *Aetna*, this Court held that Alabama Supreme Court Justice Embry

should have been disqualified from participation in a case in which he had cast the deciding vote under circumstances which created an appearance of bias. *Id.* The Court observed, "to perform its high function in the best way, justice must satisfy the appearance of justice." *Id.* at 825. Thus, as a consequence of Justice Embry casting the decisive vote in a 5-4 decision, the Court held that the "'appearance of justice' will best be served by vacating the decision and remanding for further proceedings." *Id.* at 828 (quoting *In re Murchison*, 349 U.S. 133 (1955)).

Like Justice Embry's vote in *Aetna*, Justice Karmeier's deciding vote in this case has been widely perceived as one bought by special interests. Even a newspaper which endorsed Justice Karmeier described the election as an "ugly, dispiriting, destructive, misleading, money drenched race," and suggested that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time." *Buying Justice*, ST. LOUIS POST-DISPATCH, Dec. 20, 2005 at B6. "'Karmeier's election changed the vote,' said Edward Murnane, president of the nonprofit Illinois Civil Justice League, which contributed $1.2 million to judge's campaign and filed an *amicus* brief supporting Philip Morris." Barbara Rose, *Philip Morris Law Firms, Supporters Backed Judge*, CHICAGO TRIBUNE, December 16, 2005. The *Tribune* article also noted that Justice Karmeier had received $1.2 million from the Illinois Civil Justice League. *Id.*

Justice Karmeier's opinion that the defrauded plaintiffs had not proven they had suffered any actual damages echoed that advocated in an *amici* brief filed in support of Philip Morris by two interests which had donated $22,000 to the judges campaign—the precise sum Philip Morris and its parent company had contributed to those two organizations. *See* Brief of the National Association of Manufacturers and the Illinois Manufacturers' Associa-

tion as Amici Curiae in Support of Appellant Philip Morris USA Inc., 2003 WL 25291621.

Shortly after the decision, Justice Karmeier was depicted in a political cartoon sitting on a mule with sacks of Philip Morris money and a package of "Karmeier Lights," parodying a Marlboro Lights ad. The caption read: "More freedom from class action lawsuits." ST. LOUIS POST-DISPATCH, Dec. 20, 2005 at B6. "[A]n ordinary citizen, jaded by Illinois' long history of government shenanigans, might wonder whether Mr. Karmeier was simply returning the favor. Considering that Mr. Karmeier never heard the arguments made in the Philip Morris case (he came on the bench a month after the case was argued) and the glaring appearance of conflict of interest, a decent argument for recusal could be made." *Id.*

Although Petitioners have raised no due process or recusal issues in their petition, the question they have raised regarding the appropriate interpretation of FTC consent decrees is an important one which this Court should resolve. The Illinois Supreme Court's dubious resolution of that question despite even more dubious appearances underscores the need for this Court's intervention.

II. THE FOUR JUSTICES' RESOLUTION OF THE PROPER INTERPRETATION OF FEDERAL TRADE COMMISSION CONSENT ORDERS "ENTIRELY" ON STATE LAW GROUNDS WAS AN ATTEMPT TO SHIELD THEIR DECISION BY REVIEW IN THIS COURT, ANOTHER FACTOR WHICH SUPPORTS A GRANT OF CERTIORARI.

"It is settled law that a judgment of a state court which is put upon a nonfederal ground" may be reviewed in this Court when "the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). *Accord Ward v. Love County*, 253 U. S. 17, 22 (1920); *Enterprise Irrig. Dist. v. Canal Co.*, 243 U. S. 157,

164 (1917); *Leathe v. Thomas*, 207 U. S. 93, 99 (1907). As Justice Holmes hypothesized:

> there might be cases where, although the decision put forward other reasons, it would be apparent that a Federal question was involved, whether mentioned or not. It may be imagined, for the sake of argument, that it might appear that a state court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction.

Leathe, 207 U. S. at 99 (citing *Johnson v. Risk*, 137 U.S. 300, 307 (1890)). This is such a case.

The four justice majority emphatically insisted that they had "resolved the present case entirely on the basis of state law" (Pet. App. 87a), despite narrating at length Philip Morris's arguments throughout the litigation "that this action is expressly or impliedly preempted by federal law." *Id.* Their purported resolution of this case, however, depended entirely upon their interpretation of two FTC consent orders. Even though neither of those consent orders had anything to do with the propriety of marketing cigarettes as "lights," and even though Philip Morris was not a party to either of those consent orders, the justices concluded that "PMUSA was specifically authorized" by those two FTC consent orders "to use the disputed terms ...." *Id.* at 86a. Thus, the justices' characterization of their decisions as resting exclusively on the resolution of state law was at least somewhat disingenuous, and a fairly transparent device to prevent review in this Court on the federal preemption question.

The Federal Trade Commission has never adopted a single trade regulation rule governing the advertising of

so-called "light" cigarettes. The FTC has never defined the term "light." Federal Trade Commission Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158 (1997). Neither of the two consent orders which the justices purported to interpret said anything about the use of the term "lights." Their conclusion that the FTC "authorized" any cigarette company's use of the term "lights"—let alone Philip Morris's use of that term in particular—"is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review" in this Court.

Moreover, the justices' conclusion that the FTC had "authorized" Philip Morris's use of the terms "lights" and "lowered tar" is tantamount to a conclusion that state law claims challenging the use of those terms are federally preempted. It has long been recognized that "a federal agency may pre-empt state law" when "it is acting within the scope of its congressionally delegated authority." *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986). If the FTC had really "authorized" Philip Morris's use of the term "lights," the justices should have had little trouble concluding that Petitioners' claims were preempted. This is particularly true because they had already made the express finding that the FTC was "operating under statutory authority." Pet. App. at 55a. It is at least plausible, if not likely, that the justices sidestepped that obvious legal conclusion in an attempt to evade this Court's review.

The question regarding the effect of a Federal Trade Commission consent order is rather obviously a question of federal law. The decision below which hinged on that very question was therefore not resolved "entirely on the basis of state law," the justices' assertion to the contrary notwithstanding. The decision below bears the earmarks of a lower court "seeking to evade the jurisdiction of this court." This is an additional and compelling reason for the Court to grant certiorari.

CONCLUSION

Illinois is just one of thirty-eight states that elect their high court justices. Deborah Goldberg *et al., The New Politics of Judicial Elections 2004*, vi (Justice At Stake 2005) (available at http://www.JusticeatStake.org/files/NewPoliticsReport2004.pdf). During the 2001-02 election cycle, supreme court candidates in seven states each raised more than $1 million, a number which increased to 11 states in the 2003-04 election cycle. Deborah Goldberg *et al., The New Politics of Judicial Elections 2002*, 19 Fig. 9 (Justice at Stake 2004) (available at http://faircourts.org/files/NewPoliticsReport2002.pdf).

More than seventy percent of Americans believe that judicial campaign contributions have at least some influence on judges' decisions in the courtroom. Justice at Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004) (available at http://faircourts.org/files/ZogbyPollFactSheet.pdf). The judiciary share the public's concern. According to a 2002 written survey of 2,428 state lower, appellate, and supreme court judges, nearly half of the judges surveyed (forty-six percent) themselves believe that campaign contributions to judges influence their decisions. Greenberg Quinlan Rosner Research & American Viewpoint, Justice At Stake State Judges Frequency Questionnaire at 5 (2002) (available at http://www.gqrr.com/articles/1617/1411_JAS_judges.pdf). And more than seventy percent of surveyed judges expressed concern regarding the fact that, "[i]n some states, nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case." *Id.* at 9. Justice Karmeier himself wondered, "How can people have faith in the system?" Ryan Keith, *Spending for Supreme Court Renews Cry for Finance Reform*, Assoc. Press (AP Wire), Nov. 3, 2004.

Precisely because of the contributions to Justice Karmeier's campaign, the decision below itself is at the very least suspect, and this is not the first such decision. The

very same four justices reached the same sort of controversial result in another consumer class action involving a large judgment against a large insurance company. *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, 126 S.Ct. 1470 (2006). The appearance of propriety is every bit as important as actual propriety, especially where courts are concerned. Accordingly, flagrant appearances of impropriety should sometimes inform this Court's decision whether to grant certiorari. This is one of those times. For all these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEROME J. SHESTACK
Counsel of Record
1650 ARCH STREET
PHILADELPHIA, PA 19103.
(215) 977-2290

MYRON M. CHERRY
30 N. LASALLE STREET
SUITE 2300
CHICAGO, ILLINOIS 60602
(312) 372-2100

Counsel for Amici Curiae

November 1, 2006